

**A Woolley Development Sdn Bhd v Tiara Contours
Construction Sdn Bhd**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
P-02-2163-10 OF 2013
LINTON ALBERT, HAMID SULTAN AND NALLINI
PATHMANATHAN JJCA
1 JULY 2015

C *Trusts and Trustees — Trusts — Existence of — Elements of — Owner of land under development entered into settlement agreement and sale and purchase agreement ('SPA') with respondent promising to convey it a yet to be constructed property as full and final settlement of debt — Property was never built*
D *— Whether no trust over property could arise — Whether respondent's only recourse to sue land owner for damages for breach of contract — Whether respondent no cause of action against appellant over proposed property as appellant was stranger to both settlement agreement and SPA*

E Cherating Development Sdn Bhd ('Cherating') owned a piece of land. It appointed a contractor to develop a commercial project on the land and charged the land to Malaysia Building Society Bhd ('MBSB') to obtain a loan. The contractor appointed the respondent as its subcontractor. Due to financial problems, construction of the project came to a halt with Cherating owing monies to its contractor and the latter, in turn, owing the respondent RM262,500. The three parties entered into a settlement agreement under which, in full and final settlement of all debts between themselves, Cherating agreed to, and subsequently did, execute a sale and purchase agreement ('SPA') in the respondent's favour of a yet to be built ground-floor unit of a shop-office ('the property') in the project which the respondent was deemed to have already fully paid for. The property was never built. Subsequently, Cherating, with MBSB's consent, entered into an agreement to transfer the land to the appellant so that the latter could take over and complete the development of the project and settle monies owing to MBSB. The transfer of the land to the appellant, however, never took place and it continued to remain in Cherating's name and charged to MBSB. The respondent filed a suit in the High Court seeking specific performance of the SPA — alternatively, RM262,500 in damages — against Cherating and the appellant. The claim against Cherating was later withdrawn because it had been wound up and the trial proceeded only against the appellant. The High Court ruled in favour of the respondent holding that as the property was deemed to have been fully paid for, Cherating held the property as bare trustee for the respondent and as the appellant knew of the existence of that trust, the appellant was liable as constructive trustee to restore the property to the respondent or pay damages in lieu. Alternatively, the

trial court held the appellant's liability to the respondent arose as successor in title to Cherating under the SPA. The instant appeal was against the High Court's decision.

Held, allowing the appeal and setting aside the decision of the High Court:

- (1) The trial court erred in concluding that Cherating held the property on trust for the respondent or that the appellant unlawfully acquired the property as constructive trustee. The property was never in existence when the settlement agreement or the SPA was entered into. There was no subject-matter from which the existence of a trust, constructive or otherwise, could be inferred. Trust property must be in existence in the first place for a constructive trust to arise by operation of law (see paras 28, 30 & 44).
- (2) The settlement agreement and the SPA only amounted to a promise by Cherating to settle the respondent's debt by giving it the proposed property and did not and could not create an interest in land capable of being transferred or becoming the subject-matter of a trust. The respondent's recourse was against Cherating for damages for breach of contract as specific performance was not possible (see paras 41–43).
- (3) The appellant was never the owner of the property at any time and had never acted wrongfully or unconscionably to deprive the respondent of the property. The property remained a part of the land registered in Cherating's name, and charged to MBSB, as Cherating never transferred ownership of the land to the appellant. The appellant was never privy to either the settlement agreement or the SPA; it never stepped into the shoes of Cherating and was not Cherating's successor in title. There was no basis on which the respondent could seek to enforce the SPA or the settlement agreement against the appellant (see paras 33–38, 48–50 & 53).

[Bahasa Malaysia summary]

Cherating Development Sdn Bhd ('Cherating') memiliki sebidang tanah. Ia melantik kontraktor untuk membangunkan projek komersial di atas tanah tersebut dan caj tanah tersebut kepada Malaysia Building Society Bhd ('MBSB') untuk mendapatkan pinjaman. Kontraktor tersebut melantik responden sebagai subkontraktornya. Akibat masalah kewangan, pembinaan projek tergendala dengan Cherating berhutang wang kepada kontraktornya dan kontraktor tersebut, sebaliknya berhutang dengan responden sebanyak RM262,500. Ketiga-tiga pihak memasuki perjanjian penyelesaian di bawah mana, penyelesaian penuh dan muktamad kesemua hutang di antara mereka, Cherating bersetuju, dan kemudiannya telah melaksanakan perjanjian jual beli ('PJB') memihak responden terhadap unit tingkat bawah kedai pejabat yang belum dibina ('hartanah') dalam projek yang mana responden dianggap telah

- A membayar jumlah keseluruhannya. Hartanah tersebut tidak pernah dibina. Kemudian, Cherating, dengan izin MBSB memasuki perjanjian untuk memindah tanah tersebut kepada perayu dengan itu perayu dapat mengambil alih dan menyiapkan pembangunan projek tersebut dan menyelesaikan wang yang dihutang kepada MBSB. Pemindahan tanah kepada perayu, walau bagaimanapun, tidak pernah mengambil tempat dan ia berterusan kekal atas nama Cherating dan dicaj kepada MBSB. Responden memfailkan tindakan di Mahkamah Tinggi memohon pelaksanaan spesifik PJB — alternatif, RM262,500 dalam ganti rugi — terhadap Cherating dan perayu. Tuntutan terhadap Cherating kemudiannya ditarik balik kerana ia telah digulung dan perbicaraan diteruskan hanya terhadap perayu. Mahkamah Tinggi memutuskan memihak responden dengan memutuskan bahawa hartanah tersebut dianggap telah dibayar penuh, Cherating memegang hartanah tersebut sebagai pemegang amanah bagi responden dan memandangkan perayu mengetahui kewujudan amanah tersebut, perayu bertanggungjawab sebagai pemegang amanah konstruktif untuk mengembalikan hartanah tersebut kepada responden atau membayar ganti rugi sebagai ganti. Secara alternatif, mahkamah perbicaraan memutuskan liabiliti perayu kepada responden berbagkit sebagai pengganti hakmilik Cherating di bawah PJB tersebut. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.
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Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

- (1) Mahkamah perbicaraan tersilap dalam memutuskan bahawa Cherating memegang hartanah tersebut atas amanah bagi responden atau bahawa perayu secara salah dari segi undang-undang memperoleh hartanah tersebut sebagai pemegang amanah konstruktif. Hartanah tersebut tidak pernah wujud apabila perjanjian penyelesaian atau PJB dimasuki. Tidak terdapat perkara daripada mana kewujudan amanah, konstruktif atau sebaliknya, boleh disimpulkan. Hartanah amanah mesti wujud dari mula bagi amanah konstruktif berbangkit melalui operasi undang-undang (lihat perenggan 28, 30 & 44).
- (2) Perjanjian penyelesaian dan PJB hanya merupakan perjanjian oleh Cherating untuk menyelesaikan hutang responden dengan memberikan kepadanya hartanah yang dicadangkan tersebut dan tidak boleh membentuk kepentingan dalam tanah yang berkebolehan untuk dipindahkan atau menjadi perkara amanah. Jalan keluar responden terhadap Cherating adalah ganti rugi bagi pelanggaran kontrak kerana pelaksanaan spesifik adalah tidak mungkin (lihat perenggan 41–43).
- (3) Perayu tidak pernah menjadi pemilik hartanah pada bila-bila masa dan tidak pernah bertindak secara salah atau betul-betul untuk menafikan responden daripada hartanah tersebut. Hartanah kekal sebahagian tanah yang didaftar atas nama Cherating, dan dicaj kepada MBSB, kerana
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Cherating tidak pernah memindahkan pemilikan tanah tersebut kepada perayu. Perayu tidak pernah privi sama ada kepada perjanjian penyelesaian atau PJB; ia tidak pernah mengambil alih peranan Cherating dan bukan pengganti hak milik Cherating. Tidak terdapat asas di mana responden boleh memohon untuk menguatkuasakan PJB atau perjanjian penyelesaian terhadap perayu (lihat perenggan 33–38, 48–50 & 53).]

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Notes

For cases on existence of trusts, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 3422–3436.

C

Cases referred to

Bacom Enterprise Sdn Bhd v Jong Chuk & Ors [2011] 5 MLJ 820, CA (refd)
Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors [2014] 4 MLJ 64, FC (refd)

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Woolley Development Sdn Bhd v Mikien Sdn Bhd [2008] 1 MLJ 585; [2008] 2 CLJ 303, CA (refd)

Woolley Development Sdn Bhd v Stadco Sdn Bhd (No 2) [2011] 6 MLJ 121, CA (refd)

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Legislation referred to

Rules of the High Court 1980 O 81

Appeal from: Civil Suit No 22–480 of 2006 (High Court, Pulau Pinang)

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Gan Tek Chong (Gan & Lim) for the appellant.
Neoh (BC Teh & Yeoh) for the respondent.

Nallini Pathmanathan JCA (delivering judgment of the court):

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INTRODUCTION

[1] This appeal raises the question of the enforceability of a sale and purchase agreement, entered into between a vendor and purchaser, as against a third party. The third party had, subsequent to the original sale and purchase agreement between the purchaser and vendor, entered into a separate agreement for a transfer of land with the vendor. In these circumstances, the purchaser under the sale and purchase agreement sought to enforce the sale and purchase agreement against the third party.

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[2] The purchaser's ground for seeking such enforcement was that the third party was a constructive trustee that held the subject property on trust for the purchaser, as the purchase price had been cleared to be paid in full.

A Alternatively, it was contended that the third party was the ‘successor-in-title’ to the vendor and was therefore effectively bound by the terms of the sale and purchase agreement.

B [3] As such, this appeal raises issues relating to the law of trusts and privity of contract.

SALIENT BACKGROUND FACTS

C [4] Cherating Development Sdn Bhd (‘Cherating’) who was the first defendant in the court below, was a developer and remains the registered proprietor of land in Seberang Prai known as Lot No 1964, Seksyen 3 Seberang Perai Utara, Pulau Pinang (previously known as Lot Nos 347, 198, 784, 786, 788, 565, 1961, 1116, 6, 190, 5, 4509, 4510 & 4511, Seksyen 3, Seberang Perai Utara, Pulau Pinang) (‘the land’).

D [5] Cherating had, in or around 1997 sought to develop a commercial project on the land known as the ‘Raja Uda Commercial Centre’ (‘the project’). The main contractor for the project was one Syarikat Pembinaan Chan & Chua Sdn Bhd. It appointed the respondent (the plaintiff in the court below) as the sub-contractor for the project.

E [6] The respondent will be referred to as the plaintiff and the appellant as the second defendant, as they were in the court below.

F [7] The development of the project by Cherating proved unsuccessful as it had insufficient funds to pay the main contractor. As a consequence, construction ceased sometime prior to 2000.

G [8] It is not in dispute that by reason of these events, Cherating owed the main contractor monies, and the main contractor in turn, owed the plaintiff the sum of RM262,500 (two hundred and sixty-two thousand and five hundred ringgit). In partial satisfaction or compromise of this debt, three parties, namely Cherating, the main contractor and the plaintiff (as sub-contractor) entered into a ‘Memorandum of Agreement’ dated 21 January 2000 (‘the settlement agreement’).

THE SETTLEMENT AGREEMENT (BETWEEN CHERATING, THE MAIN CONTRACTOR AND THE PLAINTIFF)

I [9] By the terms of this settlement agreement, Cherating acknowledged that it was indebted to the main contractor and the main contractor acknowledged that it was indebted to the plaintiff in the said sum of RM262,500. The settlement agreement effectively provided that in full and

final satisfaction of the debt of RM262,500 owed to the plaintiff by the main contractor, Cherating would execute a sale and purchase agreement in favour of the plaintiff in respect of one ground floor unit of shop-office in the project, without requiring any actual payment from the plaintiff. The plaintiff was in effect setting off the debt of RM262,500 owed by the main contractor who in turn set-off the debt due from Cherating.

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[10] At the date of this settlement agreement, this unit had not been constructed. Neither had separate strata titles been issued to the entirety of the property by the authorities. It is relevant that the land was, at the time of the settlement agreement, and still remains charged to Malaysia Building Society Bhd, as security for a loan granted to Cherating.

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[11] An express term of the settlement agreement provided that Cherating confirmed and acknowledged that the purchase price for the unit was deemed to have been settled in full by the plaintiff upon execution of a sale and purchase agreement.

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[12] It was also an express term of the settlement agreement that it 'shall be binding upon the heirs, personal representatives, successors in title and assigns of the parties hereto'.

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THE SALE AND PURCHASE AGREEMENT

[13] Simultaneously with the execution of the settlement agreement, Cherating and the plaintiff entered into a sale and purchase agreement dated 21 January 2000 whereby in consideration of the settlement as arrived at between the parties, Cherating as vendor sold the ground floor shop-office unit to the plaintiff for the purchase price of RM262,500. Cherating confirmed and acknowledged that the purchase price was deemed to have been settled in full upon execution of the sale and purchase agreement.

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[14] Pursuant to cl 8(a) of the sale and purchase agreement, Cherating was to construct and deliver to the plaintiff the ground floor unit of shop-office identified as Plot 513 Unit 83A with a built up area of 104.9 square metres ('the proposed ground floor unit').

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[15] However, the building was never constructed as Cherating failed to complete the project. It was therefore in breach of the sale and purchase agreement. The project was abandoned. The proposed ground floor unit was not built.

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A THE TRANSFER AGREEMENT (BETWEEN CHERATING AND THE SECOND DEFENDANT WITH THE CONSENT OF THE CHARGE, MALAYSIA BUILDING SOCIETY BHD)

B [16] Malaysia Building Society Bhd, the chargee of the land, invited the second defendant to rehabilitate and complete the abandoned project. To facilitate this, the second defendant entered into a transfer agreement with Cherating on 20 September 2000 for, inter alia, the transfer of the land to the second defendant ('transfer agreement'). This was necessarily done with the express consent of Malaysia Building Society Bhd, as chargee.

C [17] As of the year 2000, the outstanding amount owed by Cherating to Malaysia Building Society Bhd was in the region of about RM170m. The idea was that the second defendant would rehabilitate the project, and pay out the redemption sums to redeem the lands from the chargee. The transfer agreement was not a gratuitous transfer.

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TERMS OF THE TRANSFER AGREEMENT

E [18] The preamble to the transfer agreement provided that Cherating had made separate and individual sale and purchase agreements with individual purchasers, the details of which were described in Annexure H. These sale and purchase agreements were not assigned to the second defendant.

F [19] Instead, it was a condition precedent under cl 4.1(e) of the transfer agreement that novation agreements would be entered into with the purchasers described in Annexure H. This meant that the second defendant would step into the shoes of Cherating in relation to those particular sale and purchase agreements. However the plaintiff's name did not appear in Annexure H. As such, Cherating had not acknowledged the plaintiff as an individual purchaser, notwithstanding that it had entered into a sale and purchase agreement with the plaintiff.

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TRANSFER AGREEMENT NOT PERFORMED

H [20] In any event, the transfer of the land as envisaged under the transfer agreement was never effected, as Cherating was unable to remove existing encumbrances on the land. As such, the land remains in the name of Cherating to this day. It also remains charged to Malaysia Building Society Bhd.

I [21] By virtue of the foregoing, it is evident that the second defendant was not privy to the sale and purchase agreement between the plaintiff and Cherating. Equally, the plaintiff was not privy to the transfer agreement between Cherating and the second defendant.

[22] The plaintiff, in an effort to safeguard its claim in respect of the proposed ground floor unit, lodged a caveat on the land. This caveat was expressly identified by the second defendant in the transfer agreement executed with Cherating. A

[23] The second defendant subsequently sold the land on which the unit promised to the plaintiff was to be built, to third party purchasers. The plaintiff then instituted a suit in the High Court seeking specific performance of the sale and purchase agreement against Cherating and/or the second defendant. Alternatively, the plaintiff sought damages in the sum of RM262,500 against both defendants. B C

[24] However, at the commencement of trial the plaintiff withdrew its claim against Cherating on the ground that it had been wound up. As such, Cherating is not a party to this appeal. The trial proceeded against the second defendant only. D

THE DECISION OF THE HIGH COURT

[25] In summary, in the court below the learned judge of the High Court found that: E

- (a) Cherating held the property as a bare trustee for the plaintiff;
- (b) the second defendant was guilty of 'knowing receipt' of the property being trust property held for the benefit of the plaintiff; F
- (c) accordingly, the second defendant was a constructive trustee of the property, as it had actual knowledge that the property was trust property;
- (d) as such, the learned judge concluded that the second defendant was liable to the plaintiff as a constructive trustee, and had to restore the property to the plaintiff or pay damages; G
- (e) alternatively, the second defendant was liable to the plaintiff as successor-in-title to Cherating within the meaning of two clauses in the contract between the plaintiff and Cherating. These clauses provided that the sale and purchase agreement would be binding on successors-in-title to the parties; and H
- (f) the learned judge concluded that the successor clauses placed the second defendant in the shoes of Cherating, thereby making it liable to the plaintiff for the property or its value. I

A THE DECISION OF THE COURT OF APPEAL

[26] On 17 September 2014, we heard this appeal and unanimously allowed the same, awarding costs of RM40,000 to the appellant. The reasons for our decision are set out below.

B

ANALYSIS

Could a constructive trust arise in law?

C No certainty of subject matter

[27] The learned judge found at the outset of his judgment that the plaintiff had successfully established that the second defendant was liable as a constructive trustee to the plaintiff in respect of the proposed ground floor unit. However, the proposed ground floor unit, comprising the subject matter of the 'trust', was not in existence at the point in time when a trust was supposed to have arisen.

D**E** [28] This is because the property had not been constructed at the point in time when Cherating, its main contractor and the plaintiff entered into the settlement agreement and the sale and purchase agreement. In other words, there was no subject matter from which the existence of a trust, constructive or otherwise, could be inferred.**F**

[29] The learned judge concluded that as both the settlement agreement and the sale and purchase agreement provided that payment for the proposed ground floor unit was deemed to have been paid in full, Cherating then held the property as bare trustee for the plaintiff. However in so concluding, the learned judge failed to recognise that the said unit was not in existence. In other words, the subject matter of the proposed trust was not in existence. In fact it never came into being as it was never constructed. The plaintiff's witness confirmed this fact in the course of cross-examination. The plaintiff as the sub-contractor of the project would have had knowledge of the fact of non-completion of the property.

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[30] A constructive trust is a creation of the law, which comes into existence to hold the recipient or transferee of trust property liable to the beneficial owner as a 'constructive trustee'. It is however clear beyond dispute that there must have been trust property in existence in the first place for a constructive trust to arise by operation of law.

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[31] In *Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors* [2014] 4 MLJ 64 the Federal Court defined a constructive trust as follows:

... [32] A trust is an obligation enforceable in equity, which rests on a person as owner of some property, for the benefit of another or for the advancement of certain purposes ...

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[38] From the various opinions above it may be construed that a constructive trust arises by operation of law irrespective of the intention of the parties, in circumstances where the trustee acquires property for the benefit of the beneficiary, and making it unconscionable for him to assert his own beneficial interest in the property and deny the beneficial interest of another.

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The second defendant is not the owner of the proposed ground floor unit

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[32] The learned judge had then concluded that the second defendant by acquiring the proposed ground floor unit through the transfer agreement, had done so unlawfully or unconscionably, and therefore the second defendant held or owned the proposed ground floor unit as constructive trustee. In other words, he inferred the existence of a constructive trust in law.

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[33] However once again, an essential element necessary to justify the subsistence of a constructive trust was missing. The second defendant is not, and was not, the owner of the proposed ground floor unit at any time.

E

[34] For a constructive trust to arise, it would have been necessary for the second defendant to have acquired ownership of the proposed ground floor unit from Cherating. It would also have been necessary for the second defendant to have acted wrongfully so as to deprive the plaintiff of ownership of the proposed ground floor unit, making it unconscionable for the second defendant to assert its beneficial interest in the property and deny the beneficial interest of the plaintiff. But that is plainly not the case here.

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[35] The property remains a part of the land registered in the name of Cherating, as Cherating never transferred ownership in the land to the second defendant. The land also remains charged to Malayan Building Society Bhd. In other words, another essential element for the subsistence of a constructive trust, namely that the property be owned or acquired by the second defendant, simply did not exist.

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No unconscionable conduct on the part of the second defendant

[36] The second defendant did not also take any steps to actively deprive the plaintiff of ownership of the proposed ground floor unit because there is no evidence to suggest that the second defendant acted unconscionably.

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[37] It is therefore not possible for a constructive trust to have arisen, or for the second defendant to be deemed a constructive trustee in law as there was no

A 'unlawful' conduct on the part of the second defendant calculated to deprive the plaintiff of the proposed ground floor unit.

[38] This is because the second defendant was not privy to either the settlement agreement or the sale and purchase agreement. Neither was the second defendant the successor-in-title to Cherating because the land was never transferred to it.

The land remains charged to Malayan Building Society Bhd

C [39] Another reason why a constructive trust cannot be inferred in law in these circumstances is that the land on which the proposed ground floor unit was to be constructed remains charged to Malayan Building Society Bhd. As the land was encumbered with this charge, it was not possible for Cherating to dispose of a portion of the land, comprising the proposed ground floor unit, to any third party such as the plaintiff here. A trust could not have arisen because Cherating could not sell or pass ownership to any third party without the express consent of the chargee, Malayan Building Society Bhd.

E The settlement agreement and the sale and purchase agreement

[40] When the settlement agreement as well as the sale and purchase agreement are considered in the context of this factual matrix, it is apparent that these contracts did not in fact create an interest in land in favour of the plaintiff, whereby beneficial ownership of the proposed ground floor unit passed from Cherating to the plaintiff.

G [41] On the contrary, the contracts were a means of settlement of a debt due and owing from the main contractor to the plaintiff, which debt was undertaken by Cherating. Cherating proposed to repay this debt by passing ownership of a yet to be built unit to the plaintiff. In other words, these contracts amounted to a promise by Cherating to repay the plaintiff the debt owed to it, by way of giving the plaintiff the proposed ground floor unit. In consideration of the foregoing, the plaintiff agreed to forgo its entitlement to the sum of RM262,500 being monies owed to it for works done in its capacity as sub-contractor.

I [42] As Cherating had failed to make good its promise to repay the plaintiff by transfer of a ground floor unit, the plaintiff's recourse is against Cherating for breach of contract. As such, the plaintiff's remedy against Cherating is in damages, given the fact that specific performance is not possible.

[43] But these contracts, ie the settlement agreement and the sale and purchase agreement did not and could not create an interest in land capable of being transferred or becoming the subject matter of a trust.

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[44] For the foregoing reasons, we concluded the learned judge erred in concluding that Cherating held the proposed ground floor unit on trust for the plaintiff, or that the second defendant unlawfully acquired the said unit as constructive trustee.

B

Successor-in-Title

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[45] The learned judge made an alternative ruling in his judgment. He found that the second defendant is a successor-in-title of Cherating, and as such is liable to the plaintiff for performance of the sale and purchase agreement. In so doing, the learned judge based his finding on cl 13 of the sale and purchase agreement as well as cl 10 of the settlement agreement and referred to them collectively as the 'successor clauses'.

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[46] The said clauses provide that each of those agreements is binding on the '... heirs, personal representatives, successors in title and assigns of the parties hereto'.

E

[47] If Cherating had transferred ownership of the land to the second defendant and if the sale and purchase agreement had been listed in Annexure H and become the subject matter of a novation, then it is arguable that the second defendant became the successor-in-title to Cherating. However that is not what happened here.

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[48] The land was not transferred to the second defendant. Cherating remains the registered proprietor of the land. So cl 10 of the settlement agreement does not take effect. The second defendant is not therefore the successor in title to Cherating (even if the lands had been transferred to the second defendant, it would still have remained encumbered by the charge in favour of the Malayan Building Society Bhd).

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[49] Neither was the plaintiff's sale and purchase agreement the subject matter of novation as it is not listed in Annexure H. As such, the second defendant did not step into the shoes of Cherating in this context either.

[50] In other words, the second defendant is not privy to the sale and purchase agreement. As there was no novation of the said agreement whereby the second defendant stepped into the shoes of Cherating, there is no basis on which the plaintiff can seek to enforce the sale and purchase agreement against the second defendant. There is simply no privity of contract between the two.

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- A [51] In these circumstances we concluded that the learned judge had erred in finding that the second defendant is the successor-in-title of Cherating.

The doctrine of privity of contract

- B [52] The decision of the Court of Appeal in *Bacom Enterprise Sdn Bhd v Jong Chuk & Ors* [2011] 5 MLJ 820 illustrates and expounds the doctrine of privity of contract comprehensively. In that case the plaintiff there had sued Bacom Enterprise Sdn Bhd ('Bacom') on the basis of a development agreement made between Bacom and the registered proprietors of some lands. The plaintiff was not a party to the development agreement but he was mentioned there as being the holder of an earlier power of attorney for those lands. The High Court allowed the plaintiff's claim against Bacom. The decision was reversed by this court where it was stated, inter alia, as follows:

- D ... The plaintiff is definitely not a party to the sale agreement and hence cannot enforce or rely for protection on its provisions even if some provision therein was intended to benefit him. In *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, which dealt with the English position on the doctrine of privity, Lord Reid said (at pp 472–473):

- E In considering the various arguments for the appellants, I think it is necessary to have in mind certain established principles of English law of contract. Although I may regret it, I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of the provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him. That rule appears to have been crystallised a century ago in *Tweddle v Atkinson* (1861) 1 B & S 393) and finally established in this House in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

- G [102] In *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170, the Privy Council held that the doctrine of privity applies in Malaysia.

And further down at pp 866 to 867:

- H ... This would of course be in line with the doctrine of privity. The doctrine is clear. A non-party cannot bring an action on the contract. A person not a party to a contract cannot enforce or rely for protection on its provisions. The rule of privity relates to who can enforce the contract. The doctrine of privity is clearly illustrated in Pollock & Mulla on *Indian Contract & Specific Relief Acts* (12th Ed), Vol 1 at pp 25–26; it reads:

Two aspects of the Doctrine

- I The doctrine has two aspects. The first aspect is that no one but the parties to the contract is entitled under it. Contracting parties may confer rights and benefits upon a third party in the form of promise to pay, or to perform a service, or a promise not to sue (at all or in circumstances covered by an exclusion or limitation clause). But the third party on whom such right or benefit is conferred

by contract can neither sue under it nor can rely on defences based on the contract.

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The second aspect of the doctrine is that parties to a contract cannot impose liabilities on a third party. A person cannot be subject to the burden of a contract to which he is not a party. It is the counterpart of the proposition that a third party cannot acquire rights under a contract. This rule, for example, also bars a person from being bound by an exemption clause contained in a contract to which it is not a party, so that a contract between A and B cannot impose a liability on C.

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Justification for the Doctrine

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The rule of privity has been justified on a number of grounds. First, it is unjust to enable a third party to sue on the contract and not be liable for it. Secondly, enabling third parties to enforce contracts would affect or limit the rights of contracting parties to vary or terminate the contract ...

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[53] In the instant case, the second defendant was not party to, nor privy to the sale and purchase agreement which was concluded between the plaintiff and Cherating. As such, the plaintiff could not seek to enforce the settlement agreement against a non-party, namely the second defendant. The successor-in-title clause did not have the effect of allowing the second defendant to step into the shoes of Cherating for the reasons cited above. Accordingly it was not possible for the plaintiff to seek to enforce the sale and purchase agreement or the settlement agreement against the second defendant, who was a stranger to both those agreements.

E

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OTHER DECISIONS OF THIS COURT

[54] In the course of argument before us, learned counsel for the respondent relied on the case of *Woolley Development Sdn Bhd v Mikien Sdn Bhd* [2008] 1 MLJ 585; [2008] 2 CLJ 303 ('Mikien's case') where by a majority, this court upheld a summary judgment granted pursuant to O 81 of the RHC 1980 on similar facts. In the majority judgment it was held, inter alia, as follows:

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... It is noted, as submitted by learned counsel for the plaintiff, that the second defendant had never disputed that they are the successors in title and the permitted assigns of the first defendant. Thus, by virtue of cl 41 and 38(f), the SPA is binding on the second defendant.

H

[55] In that case the primary reason for holding that the sale and purchase agreement was binding on the second defendant was due to the second defendant's failure to deny or dispute a positive averment by the plaintiff, Mikien that the second defendant was the successor in title and permitted assign of Cherating.

I

- A [56] However in the instant case during the trial of this matter, the second defendant had unequivocally disputed the allegation that it was the successor in title of Cherating.
- B [57] It is also significant to note that in the majority judgment in *Mikien's* case there was no consideration accorded to the fact that Cherating's land were not transferred to the second defendant and that those lands remained charged to Malayan Building Society Bhd.
- C [58] We would however, with respect, concur with the dissenting judgment in *Mikien's* case where Zaleha Zahari JCA held that there were issues to be tried and refused summary judgment. In the dissenting judgment it was pointed out that the mere fact that the transfer agreement had been executed between Cherating and the second defendant did not, per se make the second defendant jointly and severally liable to the plaintiffs (there) for breaches committed by Cherating in the first instance. Further, the non-listing of the plaintiffs (in that action) in Annexure H, as well as the fact that there was no novation of the agreement as envisaged by the transfer agreement clearly showed, that it had an impact on the issue of whether the second defendant was liable to a purchaser such as the plaintiffs there.
- D
- E [59] In the instant case, at the conclusion of trial it is our considered view that there was no basis for the plaintiff to seek a remedy against the second defendant as:
- F (a) the transfer agreement was never performed, and the land/property never passed to the second defendant;
- (b) Cherating remains the registered proprietor with Malayan Building Society Bhd the chargee;
- G (c) the sale and purchase agreement between the plaintiff and Cherating was not listed in Annexure H and was not novated so as to place the second defendant in the shoes of Cherating; and
- (d) as such the plaintiff could not seek recourse against a stranger to the sale and purchase agreement as well as the settlement agreement, namely the second defendant.
- H
- I [60] In *Woolley Development Sdn Bhd v Stadco Sdn Bhd (No 2)* [2011] 6 MLJ 121 this court reversed the decision of the High Court which had granted an injunction restraining, inter alia, Woolley Development from dealing with some lands forming the subject matter of 192 sale and purchase agreements made between the plaintiff there and Cherating. In setting aside the interlocutory injunction this court held, inter alia, that as there was never any contract between the second defendant there, namely Woolley Development

and the plaintiff there. As stated in that case:

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... In basic legal terms, there was never in existence any privity of contract between them.

[61] In these circumstances, we were satisfied that the second defendant could not and was not a successor-in-title to Cherating, and could not therefore be held liable to the plaintiff for the breaches occasioned by Cherating.

B

[62] As the second defendant is neither a constructive trustee in relation to the proposed ground floor unit, nor privy to, or a successor-in-title to the sale and purchase agreement between the plaintiff and Cherating, we concluded that the appeal be allowed and the decision of the High Court set aside.

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Appeal allowed and decision of the High Court set aside.

Reported by Ashok Kumar

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